National Labor Relations Board

Weekly Summary of NLRB Cases

Division of Information Washington, D.C. 20570 Tel. (202) 273-1991

September 8, 2006 W-3068

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Correction: In the August 25, 2006 issue (W-3066), the name of the Judge for *Infinity of Montclair*,

JD(SF-41-06 on page 4 should read Judge Burton Litvack.

ACF Industries, LLC (6-CA-33614; 347 NLRB No. 99) Milton, PA Aug. 28, 2006. Chairman Battista and Member Schaumber affirmed the administrative law judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act by implementing its final offer on Aug. 21, 2003, agreeing with the judge that the parties had bargained in good faith to a valid impasse as of that date. The majority also agreed that the Respondent did not violate Section 8(a)(5) by delaying the furnishing of information requested by the Steelworkers on Aug. 18, 2003. Nevertheless, they agreed that the Respondent violated Section 8(a)(5) and (1) when it implemented its proposed early termination of the parties' separate insurance and pension agreements, and unilaterally modified the agreement. [HTML] [PDF]

Dissenting in part, Member Liebman wrote:

> I cannot agree that the parties could reasonably have believed that they had reached 'the end of their rope' and were consequently at a bargaining impasse under established Board law. E.g., *Caldwell Mfg*., 346 NLRB No. 100, slip op at 12 (2006). On that ground, I would find that the Respondent's implementation of its 'last' offer violated Section 8(a)(5) of the Act. I would also find that the Respondent's delay in providing the information on health care requested by the Union independently violated Section 8(a)(5).

Turning to other alleged violations, the Board reversed the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees with plant closure if they engaged in a strike.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Steelworkers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Lewisburg, July 20-21, 2004. Adm. Law Judge David L. Evans issued his decision Feb. 1, 2005.

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Advanced Architectural Metals, Inc. (28-UC-231; 347 NLRB No. 111) Las Vegas, NV Aug. 31, 2006. Chairman Battista and Member Schaumber reversed the Regional Director's dismissal of the Employer's unit clarification petition, reinstated the petition, and remanded the case to the Regional Director for further appropriate action, including conducting a hearing. Contrary to the Regional Director, who found it appropriate to defer to an arbitrator's award because the issue turns solely on contract interpretation, the majority decided that this case involves questions of statutory policy that are within the province of the Board and not an arbitrator. [HTML] [PDF]

Member Walsh, dissenting, concluded that this case fits squarely within the Board's policy of deferring to arbitration awards in representation proceedings where the issue is solely one of contract interpretation and accordingly, the Regional Director properly deferred to the arbitrator's award and dismissed the petition.

In May 1997, the Employer signed a Memorandum of Agreement recognizing Carpenters Local 1780 as the exclusive bargaining representative of a unit of carpenters, fabricators, machine operators, and laborers. Thereafter, the Employer became a signatory to the 1995-1998

Master Labor Agreement (MLA), a multiemployer agreement with the Union. In June 2003, the Union filed grievances contending that the Employer had violated the MLA by not paying the MLA wages and benefits to the shop employees after the March 2003 expiration of the shop agreement. The Union took the position that, upon expiration of the shop agreement, the wages and benefits of the shop employees no longer were governed by the shop agreement, but rather by the MLA, which was not due to expire until June 2004.

Thereafter, the Employer filed the instant unit clarification petition seeking to clarify that there is a separate unit of its shop employees which excludes its other employees working for the Employer under the MLA. The Regional Director dismissed the petition, finding that the issue of "whether the [shop employees] unit should be clarified to exclude all work covered by the [MLA]" is an issue of contract interpretation. He emphasized that while the Board generally declines to defer to arbitration awards in representation cases, it will defer when the issue turns solely on contract interpretation. See *St. Mary's Medical Center*, 322 NLRB 954 (1977). The Regional Director concluded that resolution of the contractual dispute between the parties would resolve the issue raised by the petition and, therefore, deferred the matter to the parties' grievance-arbitration process.

(Chairman Battista and Members Schaumber and Walsh participated.)

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Agri Processor Co., Inc. (29-CA-27396; 347 NLRB No. 107) Brooklyn, NY Aug. 31, 2006. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain collectively with Food & Commercial Workers Local 342. It also adopted the judge's recommendation that the initial certification year commence on the date that the Respondent begins to bargain in good faith with the Union. [HTML] [PDF]

While Member Kirsanow joined his colleagues in adopting the judge's conclusions, he added the following observation:

> Relying on evidence that most of its unit employees presented social security numbers that do not match those in the Social Security Administration's records, the Respondent contends that these employees are illegal immigrants and that its refusal to bargain is justified by that fact. Whether or not the Respondent's employees are, in fact, working in the United States illegally is not an issue we need to address at this point.

Assuming, however, that the Respondent's contention in this regard is correct, Member Kirsanow submitted that an order compelling the Respondent to bargain with a union representing employees that the Respondent would be required to discharge under the Immigration Reform and Control Act, 8 U.S.C. § 1324a (IRCA), may reasonably be seen as somewhat peculiar by the average person. Nonetheless, he acknowledged that, as the Board recently explained in *Concrete Form Walls*, 346 NLRB No. 80, slip op. at 3-4 (2006), such an order is compelled by Sec. 2(3)'s broad definition of "employees." Member Kirsanow observed

that although it may be more rational to resolve the tension between Sec. 2(3) and the IRCA in a manner that does not place employers in the position of having to bargain with a representative of workers not lawfully entitled to work, the Board's duty is to enforce the Act as written.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by Food & Commercial Workers Local 342; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Brooklyn on April 25, 2006. Adm. Law Judge Raymond P. Green issued his decision May 12, 2006.

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Aircraft Service International Group, Inc. (28-RC-6419; 347 NLRB No. 121) Albuquerque, NM Aug. 31, 2006. The Board dismissed the petition filed by the Petitioner, Teamsters Local 492, seeking to represent a unit of all Ramp Servicemen, Fuelers, Ground Service Mechanics, and Aircraft Mechanics employed by the Employer at its facility at Albuquerque International Airport, Albuquerque, NM. [HTML] [PDF]

The Employer provides ground handling and other aircraft and passenger services primarily to commercial aviation customers, fueling services to all carriers flying in and out of the airport, and maintenance to a majority of these carriers. The Employer asserted that it is controlled by the various airlines that operate out of Albuquerque, and that, as these are common carriers subject to the Railway Labor Act (RLA), the Board lacks jurisdiction under Section 2(2) of the Act. The Petitioner contended that the relationship between the Employer and the carriers is purely one of a service provider and its customers.

The Board requested the National Mediation Board (NMB) to consider the record. Having considered the facts of this case in light of the opinion issued by the NMB, the Board found that the Employer is engaged in interstate air common carriage so as to bring it within the jurisdiction of the NMB, pursuant to Section 201 of Title II of the RLA. Accordingly, it dismissed the petition.

(Members Schaumber, Kirsanow, and Walsh participated.)

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California Gas Transport, Inc. (28-CA-19645, et al., 28-RC-6316; 347 NLRB No. 118) El Paso, TX Aug. 31, 2006. The Board upheld the administrative law judge's findings that the Respondent committed severe and pervasive unfair labor practices affecting its employees in El Paso, TX, and Nogales, AZ in violation of Section 8(a)(3) and (1) of the Act; and that a remedial bargaining order for the Nogales-based drivers unit is warranted under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1960). Consequently, it held that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Teamsters Local 104 and making unilateral changes and engaging in direct dealing. [HTML] [PDF]

The Respondent's misconduct included discharging nine employees at its El Paso facility who had engaged in a protected work stoppage and had informed the Respondent that they were going to seek union representation, discharging two employees at its Nogales facility who had engaged in union and other protected concerted activity, and subsequently giving negative employment references about the two employees.

Citing *Asplundh Tree Expert Co*., 336 NLRB 1106 (2001), enf. denied 365 F.3d 168 (3d Cir. 2004), the Board agreed with the judge that it is appropriate to assert jurisdiction over the Respondent's unfair labor practices committed in Mexico and thus, affirmed his finding that the Respondent violated Section 8(a)(1) when Operations Manager Oscar Gardea threatened employees with unspecified reprisals, Accounting Manager Joel Meraz solicited employees to resign and threatened them with discharge, and Business Agent Jesus Acosta threatened employees with discharge. Contrary to the judge, the Board found that Juan Espinoza is not an agent of the Respondent and dismissed the 8(a)(1) violation attributed to him.

The Board also agreed with the judge that the Respondent engaged in objectionable conduct when it discharged the two employees at its Nogales facility. The tally of ballots for the election held in Case 28-RC-6316 on Sept. 17, 2004, showed 4 ballots for and 8 against, the Union, with 3 challenged ballots, an insufficient number to affect the election results. The Board severed Case 28-RC-6316 from the unfair labor practice cases and dismissed it.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Teamsters Local 104; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at El Paso, April 5-8, 11 and 12; and at Tucson, AZ, May 23-26, 2005. Adm. Law Judge Gregory Z. Meyerson issued his decision Sept. 16, 2005.

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PHC-Elko, Inc., d/b/a Elko General Hospital (32-CA-17309; 347 NLRB No. 123) Elko, NV Aug. 31, 2006. Chairman Battista and Member Schaumber, with Member Liebman dissenting, reversed the administrative law judge and dismissed the complaint allegation that the Respondent violated Section 8(a)(1) of the Act by discharging Wanda Pollard for engaging in protected concerted activities. Chairman Battista and Member Schaumber found no merit in the General Counsel's argument that the judge failed to find that Pollard's discharge violated Section 8(a)(3) and adopted the judge's reasons for dismissing this allegation. [HTML] [PDF]

The Respondent operates an acute-care hospital in Elko, NV. It also operates the kitchen for the county jail pursuant to a terminable-at-will contract with Elko County. Pollard is one of approximately six cooks and helpers who worked for the Respondent preparing meals at the jail kitchen. In Feb. 1999, Operating Engineers Local 3 commenced an organizing campaign among the Respondent's service and technical employees at the hospital and the jail. The Respondent held a series of small group employee meetings to encourage a vote against union representation.

At the March 10 meeting with the jail kitchen staff, Rick Kilburn, the Respondent's chief operating officer, told the employees that they should serve as "ambassadors and marketers" for the hospital in the community, and that this effort would lead not only to improved economic conditions for the hospital but also to improved pay and working conditions for all staff. Pollard stated that she would rather resign than say anything positive about the hospital and related her husband's negative experience as a hospital patient. Kilburn responded that he was sorry to hear about her experience and said, "If you feel so bad about the hospital, why do you work for it?" Later in the meeting, Pollard announced that she did not want to work with the Respondent, but "wanted to be county."

The majority reasoned that this is a mixed-motive case. They assumed that the General Counsel met his burden of proof by showing that the Respondent discharged Pollard for engaging in protected concerted activity. They also found that the Respondent established that it would have discharged Pollard in any event for her unprotected activity, noting that Pollard attempted to shut down the Respondent's March 10 mandatory meeting, impugned Kilburn's authority by publicly rejecting his direction that she sit down and let the meeting continue and by explicitly advocating that the county replace the Respondent as the employer of the jail employees.

In dissent, Member Liebman wrote: "[T]he majority seems to assume that the Respondent met its defense burden, based simply on the finding that there was unprotected conduct for which the Respondent *could* have discharged Pollard. This approach is clearly at odds with *Wright Line*. The Respondent has never sought to prove that it would have fired Pollard *solely* for the conduct that the majority finds unprotected, presumably because it has never conceded that this is a mixed-motive case."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Operating Engineers Local 3; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Elko, Aug. 3-5, 1999. Adm. Law Judge Albert A. Metz issued his decision Dec. 13, 1999.

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Flat Dog Production, Inc.; Frank T. DeMartini, P.C.; Frank T. DeMartini, Individually; Dragon Productions A.V.V. (31-CA-24062; 347 NLRB No. 104) Los Angeles, CA Aug. 31, 2006. The Board, in this supplemental decision, adopted the administrative law judge's recommendation and ordered Respondents Flat Dog Productions, Inc. (Flat Dog) and Frank T. Demartini, PC (the P.C.) to pay the unlawfully discharged employees the amounts set forth opposite their names for a total of $47,419.88, plus interest. [HTML] [PDF]

In the prior proceeding (331 NLRB 1571 (2000), enfd. 34 Fed. Appx. 548 (9th Cir. 2002)), the Board found that Flat Dog, through its agent Frank T. DeMartini, had violated Section 8(a)(3) and (1) of the Act by discharging employees for engaging in an economic strike

and ordered Flat Dog, among other things, to make the unlawfully discharged employees whole for any and all losses they incurred as a result of Flat Dog's unlawful action. The Board considered, in this supplemental proceeding, whether Respondents Frank T. DeMartini (DeMartini), an individual and the P.C. should be derivatively liable for backpay owed by Flat Dog.

Chairman Battista and Member Schaumber agreed with the judge that Flat Dog and the P.C. are a single employer. Because the P.C. is liable on this basis, they found it unnecessary to pass on whether the P.C. may be liable on an alter ego theory. They disagreed, however, with the judge's finding that the corporate veils of Flat Dog and the P.C. should be pierced and DeMartini held personally liable for the remedial obligations. Chairman Battista and Member Schaumber noted that DeMartini is not even a shareholder of Flat Dog. P.C. is the sole shareholder of Flat Dog. And, in the absence of evidence satisfying W*hite Oak Coal*, 318 NLRB 732, 735 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996), they concluded that it is not appropriate to pierce the corporate veil to hold DeMartini personally liable for the backpay due.

Dissenting in part, Member Liebman asserted that under the test established by the Board in *White Oak Coal*, Frank T. DeMartini is properly held liable for the backpay owed to the employees he unlawfully fired because they went on strike against the film production company he controlled.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Lana H. Parke issued her supplemental decision Nov. 24, 2003.

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Goya Foods of Florida (12-CA-19668, et al.; 347 NLRB No. 103) Miami, FL Aug. 30, 2006. The Board, in agreement with the administrative law judge, held that the Respondent committed numerous violations of Section 8(a)(1), (3), and (5) of the Act. Among others, it affirmed the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging warehouse employees and union activists Alberto Turienzo, Humberto Galvez, and Jesus Martin because they participated in a union rally and by suspending and subsequently underemploying salesman Reinaldo Bravo because of his actions in support of UNITE HERE's health and safety issues with the Respondent. [HTML] [PDF]

The Board found that the Respondent violated Section 8(a)(5) and (1) by unilaterally reassigning drivers' routes on at least five occasions, assigning between 10 and 50 new stores to salesmen, and reassigning existing stores without affording notice to the Union and an opportunity to bargain. It also found that the Respondent violated the Act by withdrawing recognition from the Union in both the warehouse and sales units in December 1999.

The Board agreed with the judge that an affirmative bargaining order is warranted for the Respondent's unlawful withdrawal of recognition from the Union. For the reasons fully set forth

in *Caterair International*, 322 NLRB 64 (1996), Member Liebman adhered to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees."

Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International* that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." They agree with the U.S. Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering, Inc*., 339 NLRB 541 fn. 6 (2003); see also *Flying Foods*, 345 NLRB No. 110, slip op. at 10 fn. 23 (2005). They recognized, however, that the view expressed in *Caterair International* represents extant Board law.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by UNITE HERE; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing on 13 days between June 5-21, 2000. Adm. Law Judge Lawrence W. Cullen issued his decision Feb. 22, 2001.

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Field Family Associates, LLC d/b/a Hampton Inn NY-JFK Airport (29-CA-26729; 348 NLRB No. 2) New York, NY Aug. 31, 2006. Contrary to the administrative law judge, Chairman Battista and Member Schaumber held that the Respondent did not violate the Act by promising new benefits in anticipation of a union organizing campaign among employees working at the Respondent's Hampton Inn NY-JFK Airport and Holiday Inn NY-JFK Airport because the General Counsel failed to establish that the Respondent knew that the New York Hotel and Motel Trades Council had begun organizing efforts among the employees when the benefits were promised. The majority also concluded that the Respondent did not unlawfully make the promises even if it thought that such a campaign might begin at some point. Member Liebman dissented. [HTML] [PDF]

Chairman Battista and Member Schaumber relied on *NLRB v. Exchange Parts*, 375 U.S. 405, 409 (1964), where the Supreme Court held that "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with the employees' protected right to organize. They noted that while an election was imminent in *Exchange Parts*, the rule set out in that case is also applicable to promises or conferral of benefits during an organizing campaign but before a representation petition has been filed. E.g., *Curwood Inc*., 339 NLRB 1137, 1147-1148 (2003) enfd. in pertinent part 397 F.3d 548, 553-54 (7th Cir. 2005) (holding that a pre-petition announcement and promise to improve pension benefits violated Section 8(a)(1) where the respondent was reacting to knowledge of union activity among its employees).

In finding that it is not unlawful for a nonunion employer to improve working conditions in an attempt to reduce the general appeal of unionization when no union is actively organizing,

the majority agreed with the First Circuit's observations in *NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1310 (1st Cir. 1969). The majority wrote:

> Thus, to find an employer's promise of economic benefits unlawful, the Board must focus on whether the respondent intended to interfere with actual union organizational activity among its employees, rather than whether the respondent wanted to stay 'one step ahead' of the union by diminishing the appeal of unionization. If, as the judge held, correctly anticipating union activity was sufficient to establish an 8(a)(1) violation, the result would effectively prohibit nonunion employers from improving working conditions in hopes of diminishing the appeal of unionization generally, even when no union is present and where employees have not shown any desire to bring a union onto the scene. In sum, the judge's reasoning that it is unlawful to promise a wage increase and other benefits in anticipation of possible union activity conflicts with the law.

Dissenting Member Liebman said the majority's employer-knowledge requirement "makes no sense," noting that so long as there is employer motive to forestall union-organizing activity, actual organizing is under way, and employees reasonably believe the employer's promise of benefits was intended to discourage unionization, the promise should be found unlawful consistent with the Supreme Court's decision in *Exchange Parts*. She proposes that the Board find that an employer violates Section 8(a)(1) by promising a benefit when: (1) the employer is motivated by a desire to prevent employees from unionizing; (2) organizing activity is in fact under way; and (3) the employees reasonably would perceive a connection between the employer's promise of benefits and their protected activity. Member Liebman found all three elements are satisfied in this case and that the Respondent violated Section 8(a)(1) by promising benefits.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by New York Hotel and Motel Trades Council; complaint alleged violation of Section 8(a)(1). Hearing on various days in March and April 2005. Adm. Law Judge Raymond P. Green issued his decision June 28, 2005.

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Harding Glass Co., Inc. (1-CA-31148, 31158; 347 NLRB No. 102) Worcester, MA Aug. 29, 2006. Chairman Battista and Member Liebman, with Member Schaumber dissenting in part, adopted the administrative law judge's recommendations and ordered the Respondent to make whole ten individuals by paying them backpay amounts ranging from zero to $70,345.89 and to make payments to various union funds totaling $360,067.37. [HTML] [PDF]

At issue is the amount of backpay due discriminatee James Tritone. Tritone began working for the Respondent as a glazier in 1988. In April 1993, he suffered a severe wrist injury and was out of work for 8 weeks. Despite being under medical care for his injury, when he returned to work he continued to perform the tasks of a glazier.

After an economic strike in October 1993, Tritone, on March 15, 1994, accepted an offer for a "permanent light duty full time position" which the Respondent clarified as a "temporary modified duty position" available for 45 days at which time Respondent would evaluate Tritone's ability "to perform [his] regular duties as a glazier." When he returned to work on March 28, he saw a posted notice describing the Respondent's workers' compensation program which indicated that "[m]odified duty is temporary (no longer than 45 days). It is a process that provides full wages for an injured employee during recovery." Tritone's last day of employment was April 15, the date that he voluntarily quit.

The majority reasoned that since Tritone was performing glazier work at glazier pay at the time of the strike, he was entitled to reinstatement as a glazier and to glazier pay upon his return. Tritone worked from March 28 to April 15 but he was not paid the glazier rate. The majority agreed with the judge that Tritone's backpay should be calculated based on a glazier's rate of $22.05 per hour for his work.

Dissenting in part, Member Schaumber agreed with his colleagues in all respects except that he would reverse the judge's finding that Tritone's backpay should be calculated at the glazier's rate of $22.05 per hour. Member Schaumber explained that the Respondent's letter offering Tritone reemployment to a modified duty job indicated that Tritone would be paid at the "current glazier's pay rate which is $13.72 per hour." He found that the facts clearly show that Tritone was not recalled to a glazier position and, thus, the Respondent was not obligated, under the specific terms of the Board's order in the underlying unfair labor practice proceeding, to pay Tritone at the glazier rate. He would therefore reverse the judge's determination that Tritone should have been paid at the glazier's rate of $22.05 per hour from March 28 to April 15, 2004.

(Chairman Battista and Members Liebman and Schaumber participated.)

Adm. Law Judge Joel P. Biblowitz issued his supplemental decision June 29, 2005.

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Highlands Hospital Corp., Inc. d/b/a Highlands Regional Medical Center (9-CA-39186, 39460; 347 NLRB No. 120) Prestonburg, KY Aug. 31, 2006. The Board affirmed the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Service Employees District 1199 and by later unilaterally implementing a pay increase without first notifying the Union and offering it an opportunity to bargain about the change. It held that an affirmative bargaining order is warranted as a remedy for the Respondent's unlawful withdrawal of recognition. [HTML] [PDF]

The Board certified the Union in June 1999 as the collective-bargaining representative of a unit of the Respondent's registered nurses (the RNs). The parties negotiated an initial collective-bargaining agreement effective by its terms from Nov. 14, 1999 to April 12, 2002. In Sept. 2001, several unit members, led by RN Ilene Lewis, formed a "Nurses Decertification Committee" (NDC), primarily because of dissatisfaction over their pay. The NDC collected

signatures on an employee petition titled "Highlands Regional Medical Center Showing of Interest for Decertification of SEIU Union Registered Nurses." Slightly fewer than 50 percent of the 77 unit employees signed the petition in Sept. and Oct. 2001.

On Jan. 2, 2006, the NDC filed a decertification petition with the Board's Regional Office, and submitted the signatures as the showing of interest in support of the petition. The NDC obtained two more signatures on the showing of interest on Feb. 7, 2006. By letter dated March 11, 2006, the NDC forwarded the decertification petition and updated showing of interest to the Respondent. Thereafter, on March 19, 2006, Respondent's CEO Warman sent a letter to the nurses and the Respondent's counsel sent a letter to the Union. Both letters stated that based on the NDC's March 11 letter and attached showing of interest, the Respondent was canceling a bargaining session with the Union scheduled for the following day and that the Respondent would withdraw its recognition of the Union when the collective-bargaining agreement expired on April 12.

Applying *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), the Board evaluated whether the Respondent acted unlawfully in withdrawing recognition from the Union, and agreed with the judge that the evidence on which the Respondent relied did not demonstrate the Union's actual loss of majority status. It noted, as did the judge, that the employee petition neither states that the signers do not desire to be represented by the Union nor does it request that the Respondent withdraw recognition from the Union. "Rather, on its face the document states that it is a 'showing of interest for decertification' of the Union," the Board wrote. It noted also that numerous newsletters and other documents authored and distributed by the NDC over subsequent months and provided to CEO Warman, expressly stated the NDC's goal of obtaining a decertification election and amply demonstrate the Respondent's knowledge that the signatures had been obtained for the purpose of requesting an election. Further, the Board pointed out that several employees testified that they signed the petition only after being told that the petition's sole purpose was to support a request for an election.

(Chairman Battista and Members Liebman and Walsh participated.)

Charges filed by Service Employees District 1199; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Prestonburg, Sept. 17-19, 2002. Adm. Law Judge Marion C. Ladwig issued his decision Jan. 9, 2003.

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Field Hotel Associates, LP d/b/a Holiday Inn-JFK Airport and Field Hotel Associates, LP d/b/a Holiday Inn-JFK Airport, Debtor-in-Possession (29-CA-26385, et al.; 348 NLRB No. 1) Jamaica, NY Aug. 31, 2006. The Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Angela Vasquez and Maria Pineros for wearing union insignia in nonpublic areas of the hotel. It also upheld his dismissal of the 8(a)(1) allegation that the Respondent summoned police to evict supporters of the New York Hotel and Motel Trades Council from the public sidewalk in front of

the hotel, and his dismissal of the allegations that the Respondent violated Section 8(a)(3) and (1) by beginning to enforce, for nondiscriminatory reasons, a preexisting rule imposing time limits on employees punching in or out of work, and by discharging employees Shakela Stephens and Monique Bullen. [HTML] [PDF]

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(1) when it promised wage increases and other benefits at a May 25, 2004 meeting with employees with the intention of dissuading employees from voting for or supporting the Union for the reasons stated in a related case, *Hampton Inn NY-JFK Airport*, 348 NLRB No. 2. In that case, the Board reversed the judge and found that because the General Counsel did not establish that the Respondent knew of the organizational activity at the JFK airport hotels when it promised wage increases and other benefits, the Respondent did not interfere with the employees' Section 7 rights in violation of Section 8(a)(1).

For the reasons stated in her dissent in *Hampton Inn NY-JFK Airport*, Member Liebman dissented from the majority's failure to find that the Respondent violated Section 8(a)(1) by promising its employees, who were engaged in an active union organizing campaign, wage increases and other benefits.

On another alleged violation, the Board reversed the judge's finding that the Respondent violated Section 8(a)(3) and (1) by suspending employee Dawlat Sookram for wearing union insignia in a nonpublic area of the hotel. Contrary to the judge, the Board found that the General Counsel failed to prove that animus against Sookram's protected activity motivated the decision to suspend him. It decided that the Respondent lawfully suspended Sookram for his undisputed failure to follow an instruction to report to the Respondent's personnel office before he clocked out of work.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by New York Hotel and Motel Trades Council; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Brooklyn on various days in March and April 2005. Adm. Law Judge Raymond P. Green issued his decision Aug. 4, 2005.

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Mail Contractors of America (18-CA-17636; 347 NLRB No. 88) Des Moines, IA Aug. 31, 2006. The Board held, in agreement with the administrative law judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing a driver-relay point from York to Havelock, NE without first giving the Postal Workers Des Moines Area Local an opportunity to bargain over the change and its effects. Members Liebman and Walsh relied, as did the judge, on *McClatchy Newspapers, Inc*., 321 NLRB 1386 (1996), enfd. 131 F.3d l026 (D.C. Cir. 1997), noting that there, as here, the unilateral change had a direct effect on wages. Chairman Battista relied solely on past practice in finding that the Respondent was not privileged to unilaterally change the driver-relay point. [HTML] [PDF]

Chairman Battista and Member Liebman vacated the Notice of Potential Admonishment, Reprimand or Summary Exclusion (Notice) issued by the judge in his written decision to the Respondent's attorney, Jeffrey Pagano, finding that Pagano was not afforded adequate due notice. They decided that the Notice constituted, at a minimum, an admonishment under Section 107.177(b) of the Board's Rules and Regulations based on: (1) the judge's finding that Pagano engaged in misconduct; and (2) the fact that the public announcement of this finding of misconduct may result in negative professional consequences for Pagano and potentially serve to increase the sanction for any future misconduct. Accordingly, Pagano is entitled to due process before the judge may take action that will result in such consequences, but he was not afforded that opportunity.

Member Walsh would affirm the judge's issuance of the Notice, explaining:

> Misconduct in the courtroom is a serious matter, and judges must have the authority to control the conduct of the attorneys who appear before them. In my view, a judge should be free to reconsider that conduct, or to consider it as a whole, after the hearing has closed, and to take such action as is warranted. Absent an abuse of discretion, I would not second guess a judge's decision to issue a notice of potential admonishment.
>
> Finally, because the judge has not actually admonished Pagano, I see no due process issue here.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by Postal Workers Des Moines Area Local; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Des Moines, Sept. 27 and Nov. 30, 2005. Adm. Law Judge William G. Kocol issued his decision Jan. 26, 2006.

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North Star Steel Co. (7-CA-43609(1), et al.; 347 NLRB No. 119) Monroe, MI Aug. 31, 2006. The administrative law judge found, and the Board agreed, that the Respondent committed several unfair labor practices affecting employees working at its Monroe, MI plant based on several preelection statements by David Lewis, vice president of human resources, in mid-Sept. and the Respondent's failure to supply the Auto Workers with information about a transfer of unit work from the Monroe facility that took place in Dec. 2000. It affirmed the judge's dismissal of complaint allegations relating to employee layoffs implemented in Jan. 2001 and the lack of an annual wage increase at the Monroe facility in 2001. [HTML] [PDF]

The Board reversed the judge and found no violation with regard to the transfer of 175 tons of steel production from the Respondent's Monroe plant to its St. Paul, MN facility in Dec. and the withholding of financial and competitor information that the Union first requested in late

Oct. 2000. It concluded that the Respondent had no obligation to bargain about the "insubstantial" amount of steel production transfer (0.006 percent of Dec.'s production) and that, in the absence of evidence of a present inability to pay claim, the requested financial information and competitor information was not relevant to the Union's bargaining representative duties.

The Board found, in agreement with the judge, that the Respondent unlawfully failed to bargain over the decision to eliminate three scrap-yard positions and to displace three scrap-yard operator employees at the Monroe facility. The judge recommended that the Respondent be required to bargain, that the status quo ante be restored, and that the employees be made whole for any lost pay or benefits. Chairman Battista and Member Schaumber modified the judge's recommendation by imposing a limited backpay remedy consistent with the effects-bargaining remedy set forth in *Transmarine Navigation Corp*., 170 NLRB 389 (1968). They noted that the decision to eliminate the three scrap-yard operator positions and to displace the three employees flowed from the Respondent's earlier decision to implement a new scrap-handling system using equipment that allowed it to reduce its overall manpower needs per shift.

Chairman Battista, dissenting in part, did not find that the Respondent violated Section 8(a)(1) by threatening employees with different, unfavorable treatment and by threatening them with reduced hours and layoffs; and violated Section 8(a)(5) because it did not provide information to the Union about the transfer of the order for 175 tons of steel production.

Member Walsh, in partial dissent, disagreed with his colleagues on three points: (1) the finding that the Respondent's unlawful failure to bargain about its decision to eliminate three unit jobs and displace three unit employees from the scrap yard was only an effects bargaining violation, requiring only a *Transmarine* remedy; (2) the adoption of the judge's finding that the Respondent did not unlawfully fail to bargain with the Union about its decision not to grant a wage increase in 2001; and (3) the finding that the Respondent did not unlawfully fail to provide the Union with requested information about the Respondent's financial situation and competitors.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by the Auto Workers; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Detroit, Dec. 11-14, 2001. Adm. Law Judge Paul Bogas issued his decision June 11, 2002.

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Phoenix Processor Limited Partnership (19-CA-28831; 348 NLRB No. 4) Seattle, WA Aug. 31, 2006. Chairman Battista and Member Schaumber found that, contrary to the administrative law judge, the Respondent's fish processors were seamen and subject to maritime law, that the processors were not entitled to engage in a concerted work stoppage on board a ship, and therefore the Respondent did not violate Section 8(a)(1) of the Act by discharging 23 fish processors for engaging in a shipboard work stoppage over objections to a lengthened work day. Member Liebman dissented in part. [HTML] [PDF]

The Respondent operates the 680-foot Ocean Phoenix, a ship that operates in the Bering Sea and processes pollock into a food product called surimi. The Respondent's processors worked in the ship's factory, operating machinery that stores, sorts, cuts, freezes, and packs the product. The Board agreed with the judge that the Respondent violated Section 8(a)(1) by interrogating Luis Verduzco Sr. and discharging Ulysses Nieto and Sebastian Cortez.

The judge found that the Respondent's processors were not seamen because they were not directly involved in the operation of the vessel, and thus their concerted failure to obey the order of the captain and factory manager to return to work was not a violation of maritime law. She found the circumstances in this case distinguishable from those in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), which held that seamen engaged in a concerted shipboard work stoppage were not protected by the Act because their conduct violated federal maritime law. Chairman Battista and Member Schaumber disagreed. They wrote:

> In this case, the processors, like the crewmen in *Southern Steamship*, were seamen and, as such, subject to maritime law which establishes the necessity of following an order to return to work. The processors, like the *Southern Steamship* crew, engaged in a concerted work stoppage aboard the ship, were told to return to work, and subsequently refused. Thus, the operative facts in this case are indistinguishable from those of *Southern Steamship*. In that case, the refusal of the seamen to return to work was not protected by Section 7 of the Act. Because the processors here engaged in essentially the same activity as the crewmen in *Southern Steamship*, their concerted work stoppage was also unprotected.

Member Liebman concurred with the majority that, contrary to the judge's finding, the employees involved here were seaman for the purposes of Federal maritime law. She does not believe however that the Supreme Court's *Southern Steamship* decision compels the majority's result in finding no violation, concluding that federal maritime law overrides Federal labor law. She pointed out that "the Board has paid close attention to the facts of *Southern Steamship* in deciding how to apply our statute at sea." Member Liebman explained:

> *Southern Steamship* has been sharply criticized for restricting the labor-law rights of seamen, in favor of an older, harsher legal regime and for undercutting application of the National Labor Relations Act in other contexts where it intersects with potentially competing federal statutes. We are bound by that decision, nevertheless. But we are not required, as the majority does, to read the decision broadly or to apply it reflexively. The Board has rejected such an approach before, and it should do so here. Accordingly, I dissent.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Bradley Bagshaw, an Individual; complaint alleged violation of Section 8(a)(1). Hearing at Wenatchee, Oct. 26-29, 2004 and at Seattle, Nov. 8-9, 2004. Adm. Law Judge Lana H. Parke issued her decision Feb. 4, 2005.

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Publix Super Markets, Inc. (12-CA-21391-3, et al.; 347 NLRB No. 124) Miami, FL Aug. 31, 2006. The Board unanimously agreed (1) to adopt the administrative law judge's findings of various 8(a)(1) violations that were not excepted to; (2) to reverse the judge's finding of an 8(a)(1) violation that was based on precedent that has since been overruled; (3) to adopt the judge's finding that the Respondent violated Section 8(a)(1) by applying its bulletin board policy in a disparate manner; (4) to adopt the judge's finding that the Respondent violated Section 8(a)(1) by threatening to discipline and/or discharge employees Joaquin Garcia and Travis Hooks for engaging in concerted activity; and (5) to adopt the judge's finding that the Respondent violated Section 8(a)(3) by disciplining, and ultimately discharging, employee Luis Pacheco. [HTML] [PDF]

Chairman Battista and Member Liebman also agreed with the judge's finding that the Respondent violated Section 8(a)(1) by threatening to discharge Pacheco for engaging in union activities. Member Schaumber separately dissented on this issue. Chairman Battista and Member Schaumber, however, reversed the judge's finding that the Respondent violated Section 8(a)(1) by asking employees to report other employees' union activities. Member Liebman separately dissented on this issue.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food & Commercial Workers Local 1625 and Tarvis Hooks, Joaquin Garcia, and Edgar Linarte, individuals; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Miami on nine days between March 10 and 27, 2003. Adm. Law Judge Lawrence W. Cullen issued his decision Aug. 28, 2003.

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Regency Grande Nursing & Rehabilitation Center (22-CA-26231; 347 NLRB No. 106) Dover, NJ Aug. 30, 2006. The Board adopted the recommendations of the administrative law judge and held that the Respondent violated Section 8(a)(1), (2), and (3) of the Act by recognizing Food & Commercial Workers Local 300S as the exclusive collective-bargaining representative of its employees, and by entering into, maintaining, and enforcing a collective-bargaining agreement containing union-security and dues-checkoff provisions with Local 300S on Jan. 8, 2004, and covering its employees in the unit at a time when Local 300S did not represent a majority of the employees in the unit. [HTML] [PDF]

The judge found that the Respondent violated Section 8(a)(3) and (1) by failing to grant an April 1, 2004 wage increase to employees Belinda Walling, Amarjeel Kaur, and Norma Harvey because those employees had not signed Local 300S membership and dues checkoff authorizations. The judge rejected the Respondent's affirmative defense that this allegation was time-barred by Section 10(b) of the Act. The Board found merit in the Respondent's contention and dismissed this allegation and the allegation that employees who voluntarily joined Local 300S prior to Jan. 8, 2004 were entitled to reimbursement of their dues and fees.

SEIU 1199 New Jersey Health Care filed its original charge on Feb. 19, 2004, alleging that, since Jan. 9, 2004, the Respondent recognized Local 300S at a time when the Union had not

obtained authorization cards from a majority of the unit employees; its first amended charge on Sept. 30, alleging that the Respondent entered into a collective-bargaining agreement with Local 300S that contained a union-security clause at a time when Local 300S did not represent a majority of the unit employees; and a second amended charge during the hearing on Jan. 14, 2005, alleging that the Respondent conditioned the employees' receipt of wages and bonuses on employees' signing forms in support of Local 300S.

When the General Counsel introduced the second amended charge into the record, he simultaneously orally amended the complaint to allege that, in April 2004, the Respondent unlawfully failed to pay contractually-required wage increases to employees who had not signed union membership and dues-checkoff authorization cards.

Applying the *Redd-I* test (*Redd-I, Inc*., 290 NLRB 1115 (1988)), to the second amended charge (as clarified in the amended complaint), the Board found that the April 2004 denial-of-wage-increase allegation was not closely related to a timely filed charge and cannot survive the Respondent's 10(b)-based challenge.

(Chairman Battista and Members Liebman and Walsh participated.)

Charge filed by SEIU 1199 New Jersey Health Care; complaint alleged violation of Section 8(a)(1), (2), and (3). Hearing at Dover, on 12 days between Jan. 5 and March 11, 2005. Adm. Law Judge Steven Davis issued his decision Aug. 5, 2005.

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Renal Care of Buffalo, Inc. (3-CA-24947, et al.; 347 NLRB No. 112) Buffalo, NY Aug. 31, 2006. Agreeing with the administrative law judge, the Board held that the Respondent violated Section 8(a)(1) of the Act by removing a protected union document from the designated union bulletin board and threatening reprisals if the document were reposted. It affirmed the judge's dismissal of allegations that the Respondent engaged in direct dealing and surface bargaining, and repudiated the contract as to work schedules for bargaining unit employees on the negotiating team. The judge found, with Board approval, that the Respondent's allegedly unlawful conduct did not cause employees to request decertification of Communications Workers Local 1168. In a reversal of the judge, the Board found that the Respondent lawfully withdrew recognition from the Union on Sept. 10, 2004. Member Walsh dissented in part. [HTML] [PDF]

Renal Care of Buffalo (RCB) is a privately owned dialysis center in Buffalo, NY. During the relevant period, RCB had a service contract with Total Renal Care (TRC) for training, management, and operations. Cleve Hill, a separate dialysis center in Buffalo, was operated by Erie County Medical Center (ECMC). During the relevant period, TRC was in the process of acquiring Cleve Hill's operating license from ECMC. In late July 2004, TRC hired two nurses, Deborah Reger and Lynne Yung, who the Respondent asserted were to train at RCB and move to Cleve Hill when the license transfer was final.

The Respondent determined that there were 30 employees in the unit at the time it withdrew recognition based on an employee petition with 15 signatures stating that the

undersigned employees did not support the Union and were in favor of withdrawing recognition. The General Counsel contended that there were 32 unit employees, and thus the 15 signatures did not represent at least 50 percent of the unit. The two employees at issue are Reger and Yung.

Members Schaumber and Kirsanow adopted the judge's finding that Reger was not in the unit, but reversed his finding that Yung was in the unit when the Respondent withdrew recognition. They found that neither Reger nor Yung was ever considered by the Respondent, the Union, or unit members as an employee of RCB or as a member of the bargaining unit. Accordingly, there were 30 employees in the unit when the Respondent withdrew recognition, and the withdrawal of recognition was lawful. The General Counsel's remaining allegations involving the Respondent's conduct after it withdrew recognition and the parties' remaining exceptions to the judge's decision, were dismissed or rendered moot.

Member Walsh would affirm the judge's credibility-based finding that Yung was in the unit and, thus, the Respondent's withdrawal of recognition was unlawful. For the reasons stated by the judge, he would issue a bargaining order to remedy the violation.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Communication Workers Local 1168; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Buffalo, June 27-July 1, and July 18-19, 2005. Adm. Law Judge Bruce D. Rosenstein issued his decision Oct. 3, 2005.

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Roadway Express, Inc. and Teamsters Local 776 (5-CA-32308, 5-CB-9765; 347 NLRB No. 122) Carlisle, PA Aug. 31, 2006. The Board adopted the administrative law judge's recommendation and dismissed the complaint allegations that the Respondent Employer violated Section 8(a)(1) and (3) of the Act by discriminating against employee Jeff Haas and disciplining him, at the behest of Teamsters Local 776, because Haas was a financial core union member; and that the Respondent Union violated Section 8(b)(2) and 8(b)(1)(A) by causing and attempting to cause the Employer to discipline Haas because he was a financial core member and "Beck" objector. [HTML] [PDF]

Members Schaumber and Kirsanow agreed with the judge's conclusion that the General Counsel failed to establish, by a preponderance of the evidence, that the Union's conduct in bringing suspected DOT (Department of Transportation) driving-log violations by Haas to the Company's attention was motivated by unlawful animus. They observed that there is some evidence of animus in the record because Haas is a "core payer," i.e., a *Beck* objector. The judge found that the Union's complaints about Haas' logs were "at least arguably" valid; Haas conceded in his testimony that other drivers have complained about his logs; and noncore payer drivers have been disciplined for log entries similar to Haas'. There was no evidence that the Union failed to represent fairly four other core payers in the Company's employ. Therefore, although Members Schaumber and Kirsanow believe that there is room for doubt about the relative seriousness of the DOT violations upon which the Union based its complaints against Haas and the Union's motivation toward him, they find that the evidence of unlawful animus is insufficient to sustain the General Counsel's burden of proof.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Jeff Haas, an Individual; complaint alleged violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2). Hearing at Carlisle, Aug. 29-30, 2005. Adm. Law Judge Karl H. Buschmann issued his decision March 9, 2006.

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Smithfield Foods, Inc. and Smithfield Packing Co. (11-CA-18316, et al.; 11-RC-6338; 347 NLRB No. 109) Wilson, NC Aug. 31, 2006. The Board affirmed the administrative law judge's findings that Smithfield Foods, Inc. and Smithfield Packing Co., collectively referred to as the Respondent, violated Section 8(a)(3) and (1) of the Act and engaged in objectionable conduct during the critical period. Although it reversed several of the judge's unfair labor practice findings, the Board concluded that the remaining violations, including supervisors' threats of plant closure, interrogations, solicitation of grievances and promises of benefits, threats of job loss and loss of pay, are sufficient to warrant setting aside the election held in Case 11-RC-338 on July 8, 1999. [HTML] [PDF]

Because of the delay in processing this case, the Board disagreed with judge's recommended remedial bargaining order and instead found that employee rights would be better served by proceeding directly to a second election. To ensure that a second election is free from the effects of the Respondent's extensive unfair labor practices, the Board ordered these extraordinary remedies consistent with remedies previously imposed on the Respondent in *Smithfield Packing Co*., 344 NLRB No. 1 (2004): a broad cease-and-desist order; the mailing of the notice to all employees employed since January 22, 1999; the posting and mailing of a Spanish-language notice; a reading of the notice by a Board agent (in English and Spanish); and providing the Union with a list of the names and addresses of current employees, upon request, within 14 days of a request made within a year of this Decision.

Member Schaumber did not join his colleagues in ordering extraordinary remedies, noting that it must be demonstrated, as a precondition for granting them, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found and no such showing was made here.

The Board found no merit to the Respondent's exception to the inclusion of Smithfield Foods, Inc., as a respondent. Smithfield Foods is the parent corporation of Smithfield Packing, and Lewis Little is the president and CEO of both corporations. The Board noted that Smithfield Foods was directly responsible for several violations found, including Little's unlawful solicitation of grievances and threat of futility, adding: "Moreover, Little's involvement throughout the organizing campaign—from his April solicitation of grievances to his July threat of futility—demonstrates that he directly participated in the antiunion campaign from which the full panoply of violation found here arose."

Chairman Battista and Member Schaumber, with Member Liebman dissenting, reversed the judge's findings that Plant Manager Price and President Lewis Little's statements to employees that three previous occupants of the Wilson facility had closed after being organized by the Union constituted threats of plant closure, that the Respondent created the impression of surveillance by directing a video security camera to record employees' and union organizing

handbilling activity, and that that the Respondent violated Section 8(a)(3) and (1) by discharging employee Margaret Liggins. Chairman Battista and Member Liebman, with Member Schaumber dissenting, agreed with the judge that the Respondent violated Section 8(a)(3) by discharging employees Clarence Williams and Denise Williams.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food and Commercial Workers Local 204; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Wilson on various dates beginning March 13 and ending June 20, 2000. Adm. Law Judge Pargen Robertson issued his decision Jan. 23, 2001.

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Smithfield Foods, Inc. and Smithfield Packing Co., Inc. (11-CA-18415, 18606; 347 NLRB No. 110) Wilson, NC Aug. 31, 2006. The Board, in affirming the administrative law judge's finding that the Respondent discharged Andre Farmer in violation of Section 8(a)(3) of the Act, explained that it does not condone Farmer's offensive behavior of holding a side strip of bacon at his groin area in the presence of women employees. However, it agreed with the judge that the General Counsel satisfied his initial burden under *Wright Line* and that the Respondent failed to carry its burden to demonstrate that Farmer would have been terminated even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). [HTML] [PDF]

Smithfield Foods, Inc. and Smithfield Packing Co., Inc. are referred to collectively as the Respondent. As discussed in *Smithfield Foods, Inc.*, 347 NLRB No. 109 (2006), the Board held that Smithfield Foods is liable for the unlawful conduct found therein. In this case, it also concluded that Smithfield Foods is properly liable for Farmer's unlawful discharge, noting that Smith Food participated in the campaign opposing the Union at Smithfield's Wilson Facility, as demonstrated by a letter from Smithfield Foods President Lewis Little soliciting grievances from Wilson employees, prior to Farmer's unlawful discharge.

The Board found, in agreement with the judge, that the Respondent did not constructively discharge Clairenette Williams and that the complaint allegation that the Respondent, through Wilson Plant Manager Phil Price, unlawfully promised unspecified benefits to Williams in July 1999 to discourage union support is untimely under Section 10(b).

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Food and Commercial Workers Local 204; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Wilson, April 18-20, 2001. Adm. Law Judge George Carson II issued his decision June 22, 2001.

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Stagehands Referral Service, LLC and Stage Employees Local 84 (34-CA-10971, 34-CB-2774; 347 NLRB No. 101) Hartford, CT Aug. 31, 2006. The Board reversed the administrative law judge's dismissal of the complaint and held that the Respondent Union (Stage Employees

Local 84) violated Section 8(b)(1)(A) of the Act by failing to refer stagehand Stephen Foti to various employers, including Respondent Stagehands Referral Service (SRS), because Foti was not a member of the Union, and for reasons other than Foti's failure to tender the periodic dues and initiation fees uniformly required for membership, and violated Section 8(b)(2) by attempting to cause or causing employers to violate Section 8(a)(3). It also found that SRS violated Section 8(a)(3) and (1) by discrimination in hiring in order to encourage membership in the Union. [HTML] [PDF]

The dispute in this case centers on whether the Union's failure to refer Foti was justified by his poor work, as the Union argues, or was unjustified because it was based on Foti's nonmember status, or other arbitrary reasons, as the General Counsel argues.

In April 2004 Foti and nine other employees applied for union membership, paid the required fees, and passed a background check. At a regular membership meeting, Member Jason Philbin spoke against Foti, testifying that he told the membership that Foti was lazy and often late. At the May 24 membership meeting all applicants were approved except for Foti.

Finding no evidence of animus toward protected activity or other unlawful purpose in its decision to cease referring Foti, the judge concluded that "the only reason" the members rejected Foti is because "they found his work and tardiness lacking" and that the Union had thus rebutted the presumption. The judge rejected the General Counsel's "overly simplistic" argument that the Respondents discriminated against Foti for his union activities, i.e., his unsuccessful bid to join the Union. The judge reasoned that if the Respondents were motivated by Foti's lack of union membership they would not have consistently referred him out in the past, when he was not a union member.

The Board denied the General Counsel's motion to amend the complaint to allege that the Union operated an unlawful hiring hall. The Board asserted that Section 102.17 of the Board's Rules and Regulations, allows amendment only if they are "just." Contrary to the General Counsel's position, the Board found that granting the motion would not be "just" and affirmed the judge's denial of the motion.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Stephen Foti, an Individual; complaint alleged violation of Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2). Hearing at Hartford, April 5-6, 2005. Adm. Law Judge Joel P. Biblowitz issued his decision May 24, 2005.

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Success Village Apartments, Inc. (34-CA-9889-2, et al.; 347 NLRB No. 100) Bridgeport, CT Aug. 28, 2006. In affirming the administrative law judge, the Board held that the Respondent violated Section 8(a)(5) of the Act by: refusing to negotiate with Auto Workers Local 376 in face-to-face bargaining sessions concerning the terms of a renewal collective-bargaining agreement and insisting on conducting negotiations in separate rooms through a mediator; bargaining to impasse in support of its condition for negotiations and implementing its contract

proposals as a result of the unlawful impasse; unilaterally implementing a restricted phone use policy, a copier and facsimile use policy, and a timecard discrepancy disciplinary policy; reducing employees' sick leave accrual; and subcontracting unit work, all without bargaining with the Union or obtaining the Union's consent. [HTML] [PDF]

It also found that the Respondent violated Section 8(a)(3) and (1) by laying off, suspending, issuing warnings, or otherwise discriminating against employees because of their union activities.

The Board reversed, among others, the judge's findings that: the Respondent's board member, Robert Marcinczyk, violated Section 8(a)(1) by making disparaging remarks to Union Representative Russell See in the presence of unit employee Una Boulware; Dennis Brown's layoff was unlawful; a discriminatory warning for Raul DeSousa violated Section 8(a)(3); the Respondent's change in sick leave accrual violated Section 8(a)(3) and (1); employee John Netsel was unlawfully denied his *Weingarten* right to have a union representative present during a meeting with Supervisor Phil Segneri; and the Respondent's unilateral implementation of a locker policy violated Section 8(a)(5).

Member Liebman would affirm the violations found by the judge regarding board member Marcinczyk's remarks to Union Representative See and Netsel's request to have a union representative present during a meeting with Supervisor Segneri. She would find it unnecessary to pass on whether the reduction for sick leave accrual violated Section 8(a)(3) and (1) as the remedy for such a violation would be cumulative.

The Board found no merit in the Respondent's exceptions to certain of the judge's procedural rulings, including its arguments that the judge improperly granted a motion by the Connecticut Attorney General to quash a subpoena requiring state mediator Thomas Sweeney to testify at the hearing on the Respondent's behalf and improperly admitted into evidence the affidavit of the Respondent's former manager, George Heil, which was taken ex parte by the General Counsel after Heil ceased working for the Respondent.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Auto Workers Local 376; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Hartford, June 11-13, Sept. 15-18, 22-24, and Dec. 15-17, 2003. Adm. Law Judge Steven Davis issued his decision June 30, 2004.

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Superior Protection, Inc. (16-CA-21399; 347 NLRB No. 105) Houston, TX Aug. 31, 2006. The Board affirmed the administrative law judge's recommendations in this supplemental decision and ordered that the Respondent pay Kelvin Trotter $123,907.87 plus interest, minus tax withholding required by Federal and State laws. [HTML] [PDF]

The Board adhered to the Board's long-established policy of not deducting unemployment compensation benefits in computing backpay, rejecting the Respondent's argument to the contrary. See *Gullett Gin Co. v. NLRB*, 340 U.S. 361 (1951). For institutional reasons, Member Kirsanow applied established law holding that unemployment compensation

does not offset backpay. He reserved judgment on the merits of that precedent, however, and expressed his concern that the policy against offset for unemployment may not be consistent with the limits of the Board's remedial authority.

(Members Liebman, Schaumber, and Kirsanow participated.)

Adm. Law Judge George Carson II issued his supplemental Decision Jan. 25, 2006.

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U.S. Postal Service (5-UC-386; 348 NLRB No. 3) Washington, DC Aug. 31, 2006. Chairman Battista and Member Schaumber reversed the Regional Director's dismissal of the Employer's unit clarification petition, reinstated the petition, and remanded the case to the Regional Director for further appropriate action. Member Liebman dissented. [HTML] [PDF]

The Employer and the Postal Workers are parties to a collective-bargaining agreement that recognized the Union as the collective-bargaining representative for a nationwide unit of various groups of employees. In Oct. 1997, the Union sought to include approximately 250 Executive and Administrative Service (EAS) classifications of employees in the bargaining unit. In Dec. 1997, the parties signed a settlement agreement to "fully and completely resolve any and all issues, and all currently pending grievances" regarding the Union's unit clarification petition.

Pursuant to the settlement agreement, the parties submitted to arbitration the issue of whether the Address Management System Specialists should be included in the unit. In April 2003, the arbitrator found that the classification "is part of the APWU bargaining unit and that it is a violation of Article 1.2 of the National Agreement to exclude the position and the disputed work from the bargaining unit." The Employer then filed the instant petition seeking to exclude from the bargaining unit "all EAS personnel not historically represented by any postal union, including but not limited to the Address Management System Specialists."

The Regional Director determined that under *Verizon Information Systems*, 335 NLRB 558 (2001), the Employer was estopped from filing the petition. He emphasized that the Union and the Employer reached an enforceable agreement establishing a procedure to resolve the issue of the EAS employees, including the Address Management Systems Specialists, outside of the Board's processes.

Contrary to the Regional Director, the majority did not find that the Board's decision in *Verizo*n is dispositive. They noted that in *Verizon*, the union and the employer agreed to a procedure for voluntary recognition outside the Board's processes, including a provision to have unit issues decided by an arbitrator, that the union invoked its right under the agreement to have the issue of unit scope determined by an arbitrator, and subsequently sought to abandon the arbitration by filing a representation petition with the Board. In this case, the majority found that the Employer, unlike the union in *Verizon*, carried out its obligations under the settlement agreement and completed the arbitration process. The majority recognized that the Employer did not acquiesce to the arbitral decision but instead filed the instant petition with the Board. They found that the Employer did not breach the agreement because there was no express agreement that the Employer would refrain from exercising its right to file a petition with the Board.

Member Liebman found, contrary to the majority's view, that this case is governed by the decision in *Verizon,* which dismissed a union election petition on estoppel grounds and required the union to honor the terms of a voluntary-recognition agreement that it had already invoked, to its benefit. She wrote: "It is well established that a party may not voluntarily arbitrate a matter, lose, and only then challenge the arbitrator's authority, even if the issue arbitrated is a question of external law that would ordinarily be decided by a court or other tribunal. See, e.g., *Jones Dairy Farm v. Local P-1236, United Food & Commercial Workers,* 760 F.2d 173, 175-176 (7th Cir. 1985)."

(Chairman Battista and Members Liebman and Schaumber participated.)

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Winkle Bus Co., Inc. (34-CA-10705, 10774; 347 NLRB No. 108) Milford, CT Aug. 31, 2006. The Board adopted the administrative law judge's findings that, in opposing its employees' unionization, the Respondent violated Section 8(a)(1) of the Act by maintaining an unlawful no-solicitation policy, threatening union representatives with arrest, placing employees' union activity under surveillance, threatening employees with arrest, coercively interrogating employee Xabier Zabala, threatening employees with loss of benefits, and threatening employees with stricter discipline and increased penalties. [HTML] [PDF]

Members Schaumber and Walsh adopted the judge's finding that the Respondent violated Section 8(a)(1) by distributing to its employees a letter that stated, in pertinent part: "If you are being threatened or coerced by employees or the Union, please contact the National Labor Relations Board's Hartford Office at [telephone number] immediately or tell me." The judge found that this statement was unlawful because it impermissibly called on employees to report on their coworkers' union activity.

Contrary to his colleagues, Chairman Battista would not find this 8(a)(1) violation, noting that the Respondent's statement asked only that employees report unprotected conduct either to the Board or to management. He wrote that such requests do not reasonably tend to chill employees in their exercise of their Section 7 rights and, on the contrary, assist in assuring employees the free exercise of those rights.

Chairman Battista and Member Schaumber reversed the judge's finding that the Respondent violated Section 8(a)(1) by threatening employees that unionization would be futile. Member Walsh, dissenting on this issue, agreed with the judge that manager Laurie Winkle's statement to employee Cohen plainly implied that if the employees selected the Union as their bargaining representative they would not receive a wage increase—generally a key goal of collective bargaining—"for years."

The alleged statement of futility occurred after the Respondent posted a copy of an article from a local newspaper stating that the Board would conduct a hearing over allegations that an unrelated employer in the area "refused to negotiate a contract for its newly unionized employees." When employee Cohen saw article and stopped to read it, manager Winkle,

approached and asked him, "Do you want to wait for years for a raise like those people?" The judge viewed this statement as a threat that it would be futile for employees to select the Union as their collective-bargaining representative.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by Food & Commercial Workers Local 371; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Hartford, July 7-8, 2004. Adm. Law Judge Paul Bogas issued his decision Oct. 19, 2004.

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Wise Alloys, LLC (10-CA-34319; 347 NLRB No. 117) Muscle Shoals, AL Aug. 31, 2006. The Board modified the recommendation of the administrative law judge in this supplemental decision and ordered that the Respondent pay Melvin R. Jones $14,848 plus interest, minus tax withholding required by Federal and State laws. [HTML] [PDF]

In the underlying case reported at 343 NLRB No. 60 (2004), the Board found that the Respondent violated Section 8(a)(5) by unilaterally discontinuing its exclusive use of Electrical Workers IBEW Local 558's hiring hall. The instant issue is whether individuals, including William Ledgewood, would have been hired at the Respondent's Alloys plant if the exclusive use of the hiring hall had not been discontinued. Chairman Battista and Member Schaumber agreed with the judge that Ledgewood would not have been hired at the Alloys plant, and thus no remedy is due for him.

The Respondent hired Ledgewood in 1999 at its Southern Reclamation plant, transferred him to the Respondent's Alabama Reclamation plant and laid him off from that facility in Feb. 2003. During his layoff, the Union referred him for employment as an overhead crane operator at Respondent's Alloys plant. The judge credited testimony that the Respondent did not hire Ledgewood to fill the position at the Alloys plant because it had previously decided to recall him to work at the Alabama Reclamation plant.

In Member Walsh's view, the Respondent's decision to recall Ledgewood to the Alabama Reclamation facility does not establish that, absent its unlawful avoidance of the Union's hiring hall, it would still have not hired Ledgewood as an overhead crane operator at the Alloys plant. He would find that the Respondent failed to establish that, absent its unlawful conduct, it would not have hired Ledgewood as an overhead crane operator at the Alloys plant. Accordingly, Member Walsh would order the Respondent to offer Ledgewood instatement to this position with appropriate backpay.

(Chairman Battista and Members Schaumber and Walsh participated.)

Adm. Law Judge Keltner W. Locke issued his supplemental decision Sept. 14, 2005.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

CGLM, Inc. (an Individual) Jefferson, LA Aug. 28, 2006. 15-CA-17889; JD(ATL)-33-06, Judge George Carson II.

G.E. Maier Co. (Carpenters of Ohio and Vicinity Regional Council) Cincinnati, OH Aug. 28, 2006. 9-CA-42602; JD-63-06, Judge Arthur J. Amchan.

Postal Workers (an Individual) Washington, DC Aug. 31, 2006. 9-CA-41337; JD-64-06, Judge Richard A. Scully.

Eugene Iovine, Inc. (Electrical Workers [IBEW] Local 3) Farmingdale, NY Aug. 31, 2006. 29-CA-21052, et al.; JD-66-06, Judge David I. Goldman.

Matros Automated Electrical Construction Corp. and BTZ Electrical Corp. and Electrical Workers [IBEW] Local 363, (Electrical Workers [IBEW] Local 3 and Individuals) New York, NY Sept. 1, 2006. 2-CA-36296, et al., 2-CB-20075, 20099; JD(NY)-36-06, Judge Raymond P. Green.

United States Postal Service, Pittsburgh District (Postal Workers) Pittsburgh, PA Sept. 1, 2006. 6-CA-34608; JD-37-06, Judge Paul Buxbaum.

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NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

New Choice Food, Inc. d/b/a Bavarian Specialty Foods (Bakery Workers Local 31) (31-CA-27554; 347 NLRB No. 113) Torrance, CA Aug. 31, 2006. [HTML] [PDF]

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NO ANSWER TO COMPLIANCE SPECIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the compliance specification.)

Courtyard Manor Livonia (Service Employees Local 79) (7-CA-46452, et al.; 347 NLRB No. 114) Livonia, MI Aug. 31, 2006. [HTML] [PDF]

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TEST OF CERTIFICATION

(In the following cases, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Pace University (New York State United Teachers) (2-CA-37664; 347 NLRB No. 115) New York, NY Aug. 31, 2006. [HTML] [PDF]

Concrete Form Walls, Inc. (Carpenters Alabama Regional Council Local 127) (10-CA-36280; 347 NLRB No. 116) Birmingham, AL Aug. 31, 2006. [HTML] [PDF]

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LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATIONS CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Mr. T Carting Corp., Glendale, NY, 29-RC-11080, Aug. 30, 2006 (Members Liebman, Schaumber, and Kirsanow)
Century Petroleum, Ltd. d/b/a Orion Energy Corp., Farmingdale, NY, 29-RC-11302 Aug. 30, 2006 (Members Liebman, Schaumber, and Kirsanow)
Atlantic States Lubricants Corp., Farmingdale, NY, 29-RC-11314, Aug. 30, 3006 (Members Liebman, Schaumber, and Kirsanow)

DECISION AND ORDER [remanding to Regional Director for further appropriate action]

Attento de Puerto Rico, Inc., Caguas and Trujillo Alto, PR, 24-RC-8524, Aug. 30, 2006 (Members Liebman, Schaumber, and Kirsanow)

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(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

Ameripride Service, Inc. d/b/a Ameripride Linen & Apparel Services, Florence, KY, 9-RC-18065, Aug. 29, 2006 (Members Liebman, Schaumber, and Kirsanow)

Pacific Aging Council Endeavors, Inc. (Pace In-Home Care) IIwaco and Raymond, WA 19-RC-14835, Aug. 31, 2005 (Members Liebman, Schaumber, and Kirsanow)

DECISION AND DIRECTION [that Regional Director open and count challenged ballots]

ImageFirst Uniform Rental Service, Inc., Long Island City, NY, 29-RC-11324, Aug. 31, 2006 (Members Liebman, Schaumber, and Kirsanow)

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(In the following cases, the Board granted requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Airgas Dry Ice, Santa Fe Springs, CA, 21-UC-418, Aug. 30, 2006 (Chairman Battista and Member Kirsanow; Member Walsh dissenting)

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Miscellaneous Board Orders

DECISION ON REVIEW AND ORDER REMANDING

Freeman Decorating Co., Chicago, IL, 18-RC-17359, Aug. 29, 2006 (Chairman Battista and Member Schaumber; Member Liebman dissenting)

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